

Before the  
Federal Communications Commission  
Washington, D.C. 200554

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial Regulatory	)	CC Docket Nos. 95-20, 98-10
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

**Comments of SureWest Communications**

SureWest Communications (“SureWest”), by its attorneys, hereby submits these comments in the above-captioned matter. In these comments, SureWest submits that wireline broadband internet access service falls squarely under the Communications Act’s definition of “information service.” Moreover, SureWest provides reference to several Commission decisions which treat similar services as an information service. SureWest also demonstrates that the enumerated principles of the Commission in this proceeding will be adhered to and followed by classifying wireline broadband internet access service as an information service. In addition, continuing Commission policy has been to afford deference to small and mid-sized carriers in these matters as they do not wield the same national market strength as a Bell Operating Company (BOC) and face greater hurdles in the capital and finance markets than BOCs.

## I. Introduction

SureWest is a facilities-based provider of telecommunications services based in Roseville, California. Through its subsidiary companies, SureWest provides incumbent local exchange, competitive local exchange, interexchange, broadband and PCS services. SureWest's subsidiary, Roseville Telephone Company ("RTC"), is an ILEC serving subscribers in an 83 square mile area, with central office locations serving the Roseville and Citrus Heights California region. RTC has been providing high quality communications services to its subscribers for over 86 years, and currently serves approximately 135,000 access lines. As a component of its high quality communications service, RTC offers wireline broadband internet access service to its subscribers. RTC is at the forefront of the industry with a complete and thorough familiarity of wireline broadband internet access services and the issues surrounding this service. SureWest, based both on its experience and on its reading of the Communications Act and Commission precedent, submits that wireline broadband internet access service is correctly classified as an information service.

## II. Wireline Broadband Internet Service Falls Squarely Within the Communications Act's Definition of Information Service

As the Commission has noted in this notice of proposed rulemaking, its policy will "first and foremost be guided by, and grounded in the Communications Act."<sup>1</sup> In reaching its conclusion that wireline broadband internet access service is indeed an

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<sup>1</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, CC Docket No. 02-33, FCC 02-42 (rel. Feb. 15, 2002).

information service, the Commission need look no further than the Communications Act in which its decisions must be grounded.

Congress defined “information services” as the offering of capability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...”<sup>2</sup> Wireline broadband internet access service fits well within this definition. Specifically, wireline broadband internet access service clearly provides consumers with the technology to “acquire”, “retrieve” and “utilize” the wealth of information that is available via the Internet. It is clear from a review of the statutory definitions as well as Congressional language,<sup>3</sup> that wireline broadband internet access service is indeed an information service.

The alternative classification as a “telecommunications service” is not applicable to wireline broadband internet access service. As the Commission has found in the past, internet access service is not merely the provision of a pure transmission path, but rather it combines “computer processing, information provision, and other computer-mediated offerings with data transport.”<sup>4</sup> In contrast, the Communications Act is clear that telecommunications service requires information to be transported “without change in the form or content of the information.”<sup>5</sup>

Moreover, as the proposed rulemaking identifies, the Commission has discretion when interpreting technical matters such as this and has full authority to “fill gaps where

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<sup>2</sup> 47 USC §3(20).

<sup>3</sup> See *Report to Congress*, 13 FCC Rcd 11501, Para. 73 (rel. Apr. 10, 1998) referring to Senator McCain’s urging that internet access is an information service because it furnishes “the capability to store, retrieve, or generate information.”

<sup>4</sup> *Id.*

<sup>5</sup> 47 USC §3(43).

statutes are silent.”<sup>6</sup> The Communications Act is explicit in its inclusion of wireline broadband internet access service as an “information service” and the Commission must classify the service as such, however, even if this were not the case, the Commission has the authority to interpret the Act as defining broadband internet access service as an information service.

III. The Commission has Previously Determined that  
Other Services Functionally Equivalent to  
Wireline Internet Access Service are Information Services.

Very recently, the Commission determined that cable modem service is an information service.<sup>7</sup> In reaching this conclusion, the FCC found that cable operators providing internet access service were not “offering telecommunications service to the end user, but rather [were] merely using telecommunications to provide end users with cable modem service.”<sup>8</sup> The analysis focused on the subscriber’s single, integrated information service and found, not coincidentally, that such service qualified for treatment as an information service. In light of this recent Commission decision that broadband internet access service is an information service for cable providers, the same decision should be reached for functionally equivalent services offered by wireline broadband service providers.

The Commission has specifically recognized that intermodal competition exists among multiple platforms including wireline broadband access and cable modem

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<sup>6</sup> *National Cable & Telecommunications Association, Inc. v. Gulf Power Company*, 122 S. Ct. 782, 783 (2002).

<sup>7</sup> See *Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities*. GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, (rel. March 15, 2002).

<sup>8</sup> *Id.* at para. 41.

service.<sup>9</sup> In the same manner, the Commission has recognized that wireline broadband internet access service faces “significant intermodal competition, from satellite and terrestrial wireless broadband services.”<sup>10</sup> The logical conclusion of a finding of intermodal competition would be the finding that all intermodal competitors should be equally treated under the Communications Act. Because an identical service is rendered by cable providers who are equivalently competitive to wireline service providers, the logical conclusion must be drawn that broadband internet access service is an information service when provided by a wireline carrier. To treat broadband internet access service differently between cable providers and wireline providers would be inconsistent, arbitrary and capricious. Service providers who are subject to competition in this developing market for the same nascent broadband services should be treated with regulatory parity among competitors.<sup>11</sup>

The Commission’s former *Computer Inquiry* regime is not applicable to the recently developed wireline broadband internet access service. Rather than existing in the monopolistic telecommunications market which mandated the implementation of *Computer Inquiry* regulations, wireline broadband internet access service exists in a very competitive market where “information service providers may access customers over a variety of network platforms.”<sup>12</sup> In the instance of wireline broadband internet

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<sup>9</sup> See Notice of Proposed Rulemaking at para. 60.

<sup>10</sup> *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, (rel. Dec. 20, 2001).

<sup>11</sup> The FCC has noted that, at least with regard to cable modem issues, the instant proceeding is the functional equivalent of the previous cable modem proceeding. That proceeding determined that cable modem broadband internet access service -- the functional equivalent of wireline broadband internet access service -- is an information service. See Notice of Proposed Rulemaking at para. 9.

<sup>12</sup> Notice of Proposed Rulemaking at para. 36.

access service, competitive markets will serve as the rational regulator of prices and services. Imposition of legacy elements from the *Computer Inquiry* regime is unnecessary.

The *Computer Inquiry* regime was installed during a time when regulators could differentiate between components of service being provided to end users.<sup>13</sup> The fundamental tenet of the latter *Computer Inquiry* proceedings was the separation of basic and enhanced services. This is not the instant case. In contrast to the *Computer Inquiry* market, both consumers and the Commission have recognized that wireline broadband internet access service is an “integrated offering.”<sup>14</sup> The components of broadband internet access services, unlike offerings at the time of the *Computer Inquiry*, cannot be simply distilled into a basic or enhanced service. Thus, the bifurcated treatment imposed upon services reviewed during the *Computer Inquiry* is not applicable to wireline broadband internet access service.

Furthermore, in contrast to today's multiple platforms, the *Computer Inquiry* regime was adopted when the telephone network was the primary means of transporting information to the customers.<sup>15</sup> Indeed, the FCC has recently noted that the decades old *Computer Inquiry* regime involved a more traditional telephone network.<sup>16</sup> It bears repeating that the Commission has numerous times found

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<sup>13</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2nd 384 at para. 86 (1980).

<sup>14</sup> Notice of Proposed Rulemaking at para. 21.

<sup>15</sup> Notice of Proposed Rulemaking at para. 36.

<sup>16</sup> *Inquiry Concerning High Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket 00-185, FCC 02-77, at para. 43 (rel. March 15, 2002).

broadband internet access service to be a single integrated service.<sup>17</sup> The traditional telephone network is merely one of several pipelines available to provide broadband internet access service to customers. There is competition among providers of broadband internet access service and the previous regulatory paradigm does not incorporate such active competition into its model. The *Computer Inquiry* regime is not applicable to these recently and rapidly developing broadband internet access services.

#### IV. Commission Principles Encourage Treatment As Information Service

The Commission has enumerated several principles by which it will abide in conducting this rulemaking proceeding. SureWest submits that each and every one of these principles will be followed when the Commission recognizes that broadband internet access service offered by wireline providers is an information service.

##### A. Ubiquitous Availability of Broadband is Encouraged

The Commission's goal of providing ubiquitous availability of broadband services would be promoted by treating wireline broadband internet access service as an information service. Treatment as an information service would promote the Commission's goal through encouraging broadband deployment by incumbent local exchange carriers (ILECs) which currently have ubiquitous legacy systems.<sup>18</sup>

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<sup>17</sup> See, Notice of Proposed Rulemaking at para. 13, "Broadband internet access services fuse communications power with powerful computer capability and content"; see also, *Id.* at para. 21 noting that the Commission views broadband internet access "not consisting of two separate services, but as a single integrated offering to the end user"; see further, *Inquiry Concerning Internet over Cable*, Declaratory Ruling at para. 51 recognizing that cable operators provide "subscribers with a single service...not with separate transmission, e-mail and web surfing service."

<sup>18</sup> ILECs currently provide ubiquitous availability of service to 95% of the household in the United States. See *Telephone Penetration By Income and State*, Report, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (rel. April 2002).

In a separate proceeding, the Commission is reviewing the regulatory requirements for incumbent LEC broadband telecommunications services.<sup>19</sup> In that proceeding the Commission seeks to treat wireline broadband internet access service in an even-handed regulatory manner. The classification of wireline broadband internet access service as an information service would compliment the regulatory adjustments intended to treat wireline provision of broadband service in the same fashion as cable and wireless services. Such dual satisfaction of this requirement would serve to allow wireline broadband internet access service to operate on equal footing as other functionally equivalent services and would encourage more ubiquitous deployment as fewer barriers to entry would exist to wireline broadband internet access service.

With regard to basic physical deployment of wireline broadband internet access service, the operators of legacy wireline services could provide the vehicle for assisting in the ubiquitous deployment of such service. Most ILECs offer legacy networks of telecommunications systems which have a near ubiquitous presence throughout the nation. These same companies seek to provide broadband internet access services, and allowing those entities to compete on equal footing with other service providers that have been designated “information service” providers would promote the rapid introduction of broadband services on the existing ubiquitous network.

Moreover, the Commission has recognized that the logical evolution from encouraging wireline broadband internet access service providers to deploy service will be an advancement to fiber based systems.<sup>20</sup> Not only would an end-to-end fiber

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<sup>19</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, (rel. Dec. 20, 2001).

<sup>20</sup> Notice of Proposed Rulemaking at para. 12.



service promote the ubiquitous distribution of broadband internet access service, but it would also create an additional pipeline into consumer premises.

Finally, in areas where certain internet service providers may otherwise not provide service, the treatment of wireline broadband internet access services as an information service would permit the wireline service provider to offer a portal for these internet service providers to reach niche or other currently un-served markets with broadband internet access service.<sup>21</sup> This offering of service would further advance the Commission's goal of ubiquity as niche and sub-markets would be encouraged by the regulatory treatment that would be provided to wireline providers who provide information services.

#### B. Minimal Regulation Promotes Competitiveness

The Commission has stated the desire to promote broadband internet access services in a competitive market.<sup>22</sup> Specifically, the Commission has recognized that regulatory uncertainty exists at the state and local levels which could discourage innovation and investment.<sup>23</sup> Classifying wireline broadband internet access service as an information service would allow wireline providers to operate on a competitively equal regulatory plane with other broadband service providers. Without question, the removal of wireline regulations would encourage the unfettered development of services and pricing that could respond to consumer demands directly. Such immediate and unrestricted responses to market needs by providers will allow wireline

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<sup>21</sup> See generally the discussion of private carriage at para. 26 of the Notice of Proposed Rulemaking.

<sup>22</sup> Notice of Proposed Rulemaking at para. 5.

<sup>23</sup> SureWest notes that any regulation whatsoever, as noted in the previous paragraph, inflicts costs upon the entity that is regulated.

carriers to provide services which were more responsive to customer demands and competitively priced. Removal of disparate regulations to entry will encourage the competitiveness of wireline broadband internet access service.

On several occasions the Commission has previously recognized that protecting or promoting its statutory purpose may mean that the Commission should “not regulat[e] at all especially if a problem does not exist.”<sup>24</sup> This treatment is precisely applicable to the instant case of wireline broadband internet access service. The Commission’s goal of competition would not be promoted by regulation but rather impeded by such regulation or treatment of wireline broadband access service as a telecommunications service. As noted, *supra*, the Commission has recognized in numerous instances that substantial competition exists in the broadband internet access field.<sup>25</sup> It is clear that wireline broadband internet access service is subject to substantial competition and the classification of such service as information service would place wireline on par with competitors.

Business decisions made between internet service providers and intermodal platform operators similarly should be made without the extraneous concern of regulations which exist only for the wireline platform. Not only does the irrational imposition of regulation on only one competitor create additional burdens on that competitor, but it also creates numerous disincentives for consumers and other

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<sup>24</sup> See *Amendments of Section 64.702 of the Commission's Rules and Regulations, (Second Computer Inquiry)* para. 126 quoting *HBO v. FCC*, 567 F.2d 9 (1977), See also *City of Chicago v. FPC*, 458 F.2d 731 (1971).

<sup>25</sup> See Notice of Proposed Rulemaking, para. 36, noting “information service providers may access customers over a variety of network platforms”; see also, *Inquiry Concerning Internet over Cable, Declaratory Ruling* at para. 9 estimating that only 3 out of 10 residential broadband subscribers use DSL service, leaving 7 out of 10 subscribers taking service from competitors.

participants in the business model to engage the services of wireline providers. With the instant decision regarding classification, the Commission has the opportunity to correct this anomaly.

Finally, as the regulatory structure is analyzed, the Commission should also consider that state and local regulations will follow the classification which is made in this proceeding. The Commission should make clear in its decision regarding this classification that state and local regulations should treat this interstate information service with accord to this status.

The Commission has previously found that small and mid-sized companies<sup>26</sup> do not have the national scale necessary to engage in anti-competitive behavior.<sup>27</sup> This theory remains applicable today as the regulation of small and mid-sized telephone companies would serve no purpose to discourage anti-competitive behavior in an undeniably competitive national environment. Small and midsized carriers do not wield the nationwide monopoly power which would give the FCC concern. That is, those internet service providers who did maintain a national footprint would be able to still maintain their presence even in the smallest markets. The Commission has recently noted that consumers who wish to bypass an internet access service provider may do so with “click-through” access.<sup>28</sup> This rapidly developing method to bypass any acknowledgment of a wireline broadband internet access service provider clearly

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<sup>26</sup> Turning again to Congressional mandate, the Communications Act designates exemptions for small carriers with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide. See e.g. 47 USC 251(f)(2).

<sup>27</sup> *Amendment of 64.702 of the Commission's Rules and Regulations*, supra note 23, at para. 221.

<sup>28</sup> *Inquiry Concerning Internet Over Cable*, para 25.

indicates that small and midsized companies are unable to monopolize service provision in the broadband access market.

C. A Rational, Equivalent Framework Mandates Treatment  
Of Wireline Broadband Internet Access as an Information Service.

The FCC policy of establishing a rational, equivalent framework mandates leveling the playing field between intermodal competitors and eliminating regulation of wireline broadband internet access service. As enumerated several times herein, the Commission has recognized that wireline broadband internet access service faces competition on an equivalent platform with cable, wireless and satellite services. In light of this, and as discussed in SureWest's comments more completely in CC Docket No. 01-337, wireline broadband internet access carriers face regulatory burdens that do not exist for its competitors.

D. Classification as an information service will promote  
pricing competition for service and access to capital.

Currently wireline providers are faced with the additional costs of tariff preparation, tariff filing, and defending such tariffs.<sup>29</sup> There are additional costs associated with structural and jurisdictional separation and a regulatory lag time during which wireline providers are restricted from providing service to consumers due to pricing approval. Wireline broadband internet access service providers must make business decisions while facing significant regulatory costs which are not encountered by its competitors.<sup>30</sup>

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<sup>29</sup> As an example, of the twelve tariff filings made by SureWest's subsidiary, RTC, during the past twelve months, nine of those filings and the associated costs involved wireline broadband internet access service.

<sup>30</sup> As noted by Commissioners Martin and Copps in a recent statement, such costs include "time, trouble, and inconvenience". See Statement of Commissioner Martin and Commissioner Copps In re: National Association of Broadcasters and Association of Local Television Stations Request, CSR-5865-Z (Media Bureau, Apr. 4, 2002) page 4.

The Commission acknowledges that small entities, such as SureWest, could recognize a positive economic impact because of minimal or reduced regulatory requirements if wireline broadband internet access service is classified as an information service.<sup>31</sup> SureWest comments that this finding is indeed accurate and should be considered by the Commission regardless of the treatment to large entities.

Furthermore, it should be noted that Congress constructed the Communications Act specifically to consider information and telecommunications services without regard to the nature of the facilities being used.<sup>32</sup> As a result, the Commission should regulate broadband internet access service provided over wireline facilities in the same manner that it regulates broadband internet access service provided over other facilities. As defined by Congress, the determination that a service is an information service cannot consider the nature of the facilities which are used. It follows that a Commission decision to treat broadband internet access service as an information service if provided over cable facilities dictates that the same service provided over another facility - - wireline in the instant case - - is similarly treated.

As an illustration of the same service being treated differently due to the nature of the facilities being used, one need look no further than the current regulatory treatment faced by wireline broadband internet access service providers versus cable operators. The unbalanced regulation between cable operators and wireline providers is illustrated by two examples. The first example is the lack of regulations upon cable

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<sup>31</sup> Notice of Proposed Rulemaking, para. 105.

<sup>32</sup> See 47 USC §3(46). The Commission has recognized that telecommunications services and information services are mutually exclusive. In turn, information services are defined “regardless of the facilities used.” Report to Congress at para. 59.

operators pricing decisions and associated price responsiveness. Cable operators face no regulation of these prices while, as noted *supra*, wireline providers are faced with Commission regulation of its pricing. The second example is a cable operator's ability to creatively bundle services while a wireline competitor is limited under prescriptive tariff rates. Both of these examples indicate the unfair regulatory advantage that cable operators have over ILECs; cable operators are allowed to implement immediate pricing adjustments and may take advantage of cross-subsidizing their services with no regulatory supervision of either their cable or broadband pricing.

The present regulatory system discourages innovation and investment. The capital markets will not be as receptive to providing funding for broadband operations which are fettered by burdensome regulations in an otherwise competitive environment. Instead, wireline broadband service providers may be forced to rely upon less efficient methods of financing, such as internal funding, for deploying broadband services. The financial market's will react rationally to the irrational imposition of regulations and the result will be a lack of funding for an otherwise robustly competitive broadband service provider.

## V. Conclusion

Wherefore, good cause having been shown, SureWest again respectfully submits that wireline broadband internet access service is an information service and, pursuant to statutory authority as well as Commission precedent, should be afforded the same treatment as all other information services.

Respectfully submitted,  
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